

7-2015

## Monterossa v Superior Court

Roger Bernhardt

Golden Gate University School of Law, rbernhardt@ggu.edu

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>

 Part of the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

Bernhardt, Roger, "Monterossa v Superior Court" (2015). *Publications*. Paper 741.  
<http://digitalcommons.law.ggu.edu/pubs/741>

This Article is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

- **Borrower who obtains preliminary injunction enjoining trustee's sale of home is "prevailing borrower" entitled to attorney fees under CC §2924.12; permanent injunction is not required.**

*Monterossa v Superior Court (2015) 237 CA4th 747*

In 2005, petitioners obtained a \$359,650 mortgage from PNC Mortgage for the purchase of a home. In 2013, petitioners became unable to make their mortgage payments and contacted PNC for hardship assistance. PNC failed to send a hardship assistance package to petitioners. Despite that failure, PNC later notified petitioners that their request for hardship assistance was denied "because PNC did not receive a completed hardship assistance package" from petitioners and recorded a notice of default. In November 2013, petitioners submitted a loan modification agreement to PNC; in December 2013, PNC confirmed that it had received a complete package. Despite that pending loan modification, PNC recorded a notice of trustee's sale of the property in January 2014. Petitioners immediately called PNC and were told that their loan modification had been denied due to missing documents.

In April 2014, petitioners sought a temporary restraining order (TRO) and an order to show cause regarding a preliminary injunction, seeking to prevent the trustee's sale of their home. The superior court granted the TRO, enjoining the sale of the home pending a May 2014 hearing on the preliminary injunction motion. At that hearing, the court found (on undisputed evidence) that PNC had engaged in "dual tracking" by recording a notice of trustee's sale while engaged in the loan modification process (prohibited by [CC §2924.6\(c\)](#)) and granted the preliminary injunction.

Petitioners then filed a motion for attorney fees and costs under [CC §2924.12\(i\)](#). The superior court denied the motion on the grounds that

- Statutory attorney fees are awardable only at the end of the case; and
- The statute did not specifically provide for an interim award of attorney fees on a grant of provisional relief such as a preliminary injunction.

Petitioners appealed by writ of mandate petition. The court of appeal granted a peremptory writ, reasoning that the term "injunctive relief" as used in [CC §2924.12\(i\)](#) clearly encompasses both preliminary and permanent injunctions.

The remedies provided in [CC §2924.12\(i\)](#) for prevailing borrowers give teeth to the prohibition against dual tracking and other statutory protections for borrowers during the loan modification process. The remedies are different, depending on whether a trustee's sale deed has been recorded. Under [CC §2924.12\(i\)](#), a borrower is

deemed to have prevailed if he or she “obtained injunctive relief or was awarded damages.” The court held that, for purposes of [CC §2924.12\(i\)](#), a borrower who has obtained a preliminary injunction has prevailed in obtaining injunctive relief. Both the purpose of the statutory scheme (to ensure borrowers have a meaningful opportunity to avoid foreclosure) and the legislative history behind [CC §2924.12\(i\)](#) support this conclusion.

The trial court erred in interpreting [CC §2924.12\(i\)](#) as precluding an award of attorney fees and costs if a borrower obtains only a preliminary rather than a permanent injunction. The court of appeal noted that under this unique statutory scheme, “in many cases the best a [borrower] can hope to achieve is a preliminary injunction.” 237 CA4th at 754. The superior court was directed to vacate its order denying the motion for attorney fees and costs and to consider it on its merits.

**THE EDITOR’S TAKE:** This borrower prevailed—and was awarded attorney fees and costs—by enjoining the bank’s dual tracking, but not by ending the bank’s foreclosure process. This means that after the bank corrects its mistakes, it can complete its foreclosure. Although it certainly cannot add to the amount due under the mortgage the fees and costs that it was required to pay, can it offset those charges against what it is owed?

There are now cross-claims, with the borrowers owing the amount loaned to them, and the bank owing them fees and costs as prevailing borrowers. However, since one claim is secured and the other is not, the rules of setoff may be hard to predict or apply.—*Roger Bernhardt*

From Real Property Law Reporter (Cal CEB [July 2015]) © The Regents of the University of California, reprinted with permission of CEB